

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Implementation of Sections of )  
the Cable Television Consumer )  
Protection and Competition )  
Act of 1992: )

Rate Regulation )

Fifth Report and Order )

MM Docket No. 92-266

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**COMMENTS OF TELE-COMMUNICATIONS, INC.  
IN SUPPORT OF PETITIONS FOR RECONSIDERATION OF  
CONTINENTAL CABLEVISION AND COX COMMUNICATIONS, INC.**

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February 3, 1995

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IN SUPPORT OF PETITIONS FOR RECONSIDERATION OF  
CONTINENTAL CABLEVISION AND COX COMMUNICATIONS, INC.**

Tele-Communications, Inc. ("TCI"), by its attorneys,  
respectfully submits these Comments in support of petitions for  
reconsideration filed in the above-captioned proceeding by  
Continental Cablevision ("Continental") and Cox Communications,  
Inc. ("Cox").<sup>1</sup>

**I. INTRODUCTION**

In their petitions, Continental and Cox request that the  
Commission reconsider its decision to prohibit operators from  
retiering a limited number of regulated services to a new product

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<sup>1</sup> Implementation of Sections of the Cable Television  
Consumer Protection and Competition Act of 1992: Rate Regulation,  
MM Docket Nos. 92-266 and 93-215, Sixth Order on Reconsideration,  
Fifth Report and Order, and Seventh Notice of Proposed  
Rulemaking, FCC 94-286 (released November 18, 1994) ("Fifth  
Report and Order").

tier ("NPT") after September 30, 1994. TCI supports the Continental and Cox petitions and urges the Commission to accord all cable operators the flexibility to choose an optional, one-time retiering of a limited number of regulated services to an NPT for the following reasons:

- The Cable Act requires the Commission to ensure that rates for CPSTs, including NPTs, are not unreasonable. The Commission has ruled that cable operators who retiered a limited number of regulated services to a new tier prior to September 30, 1994, will be permitted to retain such tier as an unregulated NPT. That ruling implicitly recognizes that such limited retiering will not result in unreasonable CPST rates; otherwise, it would be inconsistent with the Commission's statutory obligation.
- Thus, so long as operators that did not retier services prior to September 30, 1994, now do so under the same terms and conditions as operators whose pre-September 30 retiering has been approved by the Commission, there is no reason to prohibit such retiering. The Commission already has ruled that limited retiering does not harm consumers.
- Prohibiting limited retiering post-September 30, 1994, creates serious marketplace distortions, limits consumer choice, and impedes the development of new programming services. It also is legally impermissible under the equal protection guarantees of the U.S. Constitution which prohibit treating like entities differently based solely on an arbitrary time distinction.

**II. THE COMMISSION SHOULD ACCORD ALL CABLE OPERATORS THE FLEXIBILITY TO CHOOSE AN OPTIONAL, ONE-TIME RETIERING OF A LIMITED NUMBER OF REGULATED SERVICES TO AN UNREGULATED NPT**

The 1992 Cable Act imposes upon the Commission a statutory obligation to regulate "rates for cable programming services that are unreasonable."<sup>2</sup> In the Fifth Report and Order, the

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<sup>2</sup> Communications Act of 1934, as amended, § 623(c)(1)(A).

Commission established the NPT as "a new category of CPSTs."<sup>3</sup> Thus, NPTs are, by definition, CPSTs, and the Commission has a statutory obligation to ensure that they are not unreasonably priced.<sup>4</sup>

In a series of letter rulings, the Commission has determined that cable operators who moved a limited number of regulated services to a new tier prior to September 30, 1994, will be permitted to retain such tiers as unregulated NPTs. Implicit in these rulings is a finding that such retiering will not result in unreasonable rates for the NPT.<sup>5</sup> Indeed, such a finding not only was correct as a matter of public policy, it was a necessary prerequisite to the Commission's decision to permit such tiers to be treated as unregulated NPTs. If the Commission had not found that the rates for these NPTs would be reasonable, it would have been prohibited under the 1992 Cable Act from forbearing from rate regulation.

TCI endorses the Commission's decision to permit operators who retiered a limited number of regulated services prior to September 30, 1994, to treat those tiers as unregulated NPTs. TCI believes, however, that operators who did not retier services prior to September 30, 1994, should now be permitted a one-time opportunity to do so under the same terms and conditions as

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<sup>3</sup> Fifth Report and Order at ¶ 22.

<sup>4</sup> See id. at ¶ 23 (footnote omitted).

<sup>5</sup> See Continental Petition at 8; Cox Petition at 22-23.

operators whose pre-September 30 retiering has been approved by the Commission.

The Commission already has established that regulation of NPTs which include a limited number of regulated services is unnecessary to ensure that such NPTs are reasonably priced because "the rates charged for NPTs will be constrained by the rates charged for BSTs and CPSTs."<sup>6</sup> If the competitive pressures exerted by BST and CPST rates are sufficient to keep NPT rates from becoming unreasonable for those systems that moved a limited number of regulated services to an NPT prior to September 30, 1994, the same competitive pressures will be sufficient to constrain NPT rates for cable operators who move a limited number of regulated services to an NPT after September 30, 1994.

In addition, as the record demonstrates, regulation of NPTs which contain a limited number of retiered services is inadvisable because it would create serious marketplace distortions, limit consumer choice, and impede the development of new programming services.<sup>7</sup>

Finally, imposing different regulatory restrictions on NPTs based solely on an arbitrary time distinction raises serious constitutional issues. The only difference between operators that have been permitted to maintain NPTs with retiered services and those operators who now seek authority to retier a limited

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<sup>6</sup> Fifth Report and Order at ¶ 36.

<sup>7</sup> See generally Continental Petition. See also Cox Petition at 19-21.

number of regulated services to an unregulated NPT is that the former retiered services before a particular date and the latter seeks to do so after this date.

The Supreme Court has consistently held that governmental classification based solely on such an arbitrary time distinction violates the equal protection guarantees of the U.S. Constitution.<sup>8</sup> Since the Commission already has found that limited retiering is consistent with its statutory obligation to ensure reasonable NPT rates, the Commission's attempt to distinguish between operators based solely on whether they retiered services before or after September 30, 1994, is impermissible under this well-established precedent.

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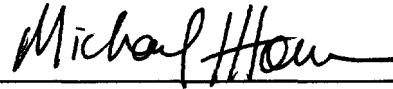
<sup>8</sup> See, e.g., Williams v. Vermont, 472 U.S. 14, 23 (1985) (striking down, on equal protection grounds, state statute that afforded a credit for the out-of-state sales/use taxes paid by Vermont residents who purchased cars from other states while they were Vermont residents, but denied such a credit to individuals who purchased out-of-state cars and paid out-of-state sales/use taxes prior to becoming Vermont residents, because "residence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants ...."); Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266, 274 (1936) (law discriminating between milk dealers who were in the business before April 10, 1933, and those who entered the business later, by granting the former and denying the latter the privilege of selling milk at a governmentally established discounted price, violates equal protection).

The FCC must comply with equal protection guarantees under the due process clause of the Fifth Amendment. See, e.g., Beach Communications v. FCC, 959 F.2d 975 (D.C. Cir. 1992).

## CONCLUSION

Based on the foregoing, TCI respectfully urges the Commission to accord all cable operators the flexibility to choose an optional, one-time retiering of a limited number of regulated services to an unregulated NPT.

Respectfully submitted,  
**TELE-COMMUNICATIONS, INC.**



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February 3, 1995

CERTIFICATE OF SERVICE

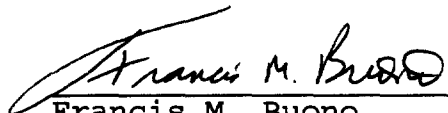
I, Francis M. Buono, hereby certify that I have caused the foregoing "Comments of Tele-Communications, Inc. In Support of Petitions for Reconsideration of Continental Cablevision and Cox Communications, Inc." to be served this third day of February, 1995, by first class mail, postage prepaid, to each of the following individuals:

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